

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 DAVID COOPER, et al.,

11 Plaintiffs,

Case No. 2:10-CV-0763-KJD-PAL

12 v.

ORDER

13 CLARK COUNTY NEVADA, et al.,

14 Defendants.

15
16 Currently before the Court is Defendants' Motion to Dismiss (#22). Plaintiffs filed an
17 Opposition (#29), to which Defendants filed a Reply (#33).

18 **I. Background**

19 Plaintiffs filed their First Amended Complaint (#8) on September 16, 2010. Plaintiffs' claims
20 are brought pursuant to 42 U.S.C. § 1983 and in pertinent part, allege vagueness and overbreadth of
21 Clark County Code 30.08.030 and violations of due process and equal protection against Clark
22 County and its employees. Defendants seek to dismiss Plaintiffs' complaint for failure to state a
23 claim and lack of subject matter jurisdiction.

24 In January 2008, Plaintiff David Cooper ("Cooper") purchased EFJ, LLC, a Nevada
25 corporation with business premises at 953 E. Sahara, Las Vegas, Nevada. As Clark County does not
26 permit the transfer of business licenses from one person to another when more than 50% of the entity

1 changes ownership, Cooper applied for five business licenses for EFJ on or about February 13, 2008.
2 The application requested business licenses for admission fees, gifts/novelties, book sales, video
3 sales/rentals, and a restaurant. On or about April 1, 2008, Cooper applied for tobacco and banquet
4 business licenses under the business name Interactive Media Communications, LLC. After
5 purchasing the corporation, Cooper allegedly spent time and money renovating the space to enhance
6 its visibility and use as a swinger's club.

7 In April 2008, Cooper provisionally opened the business under the name of "Sextacy",
8 pending the approval of the business licenses. On or about June 26, 2008, Cooper received notice
9 that his business license applications were denied based on false and misleading statements pursuant
10 to Clark County Code 6.04.090(g) and for failure to comply with restaurant license 6.12.874. Cooper
11 appealed the denial of the business licenses in July 2008. On September 9, 2008, the Clark County
12 Board of Commissioners ("Board") voted to uphold the denial of Cooper's business license
13 application. In its holding, the Board stated that it was clear that Cooper was attempting to open a
14 swinger's club, or sexually oriented business, and that Clark County does not permit such business,
15 thereby making the licenses an impossibility.

16 **II. Legal Standard**

17 Pursuant to Fed. R. Civ. P. 12(b)(6), a court may dismiss a Plaintiff's complaint for "failure
18 to state a claim upon which relief can be granted." A properly pled complaint must provide "a short
19 and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P.
20 8(a)(2); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While Rule 8 does not require
21 detailed factual allegations, it demands more than "labels and conclusions" or a "formulaic recitation
22 of the elements of a cause of action." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Papasan
23 v. Allain, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the
24 speculative level." Twombly, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint
25 must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Iqbal,
26 129 S. Ct. at 1949 (internal citation omitted).

1 In Iqbal, the Supreme Court recently clarified the two-step approach district courts are to
 2 apply when considering motions to dismiss. First, the Court must accept as true all well-pleaded
 3 factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of
 4 truth. Id. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory
 5 statements, do not suffice. Id. at 1949. Second, the Court must consider whether the factual
 6 allegations in the complaint allege a plausible claim for relief. Id. at 1950. A claim is facially
 7 plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable
 8 inference that the defendant is liable for the alleged misconduct. Iqbal, 129 S. Ct. at 1949. Where
 9 the complaint does not permit the court to infer more than the mere possibility of misconduct, the
 10 complaint has "alleged—but not shown—that the pleader is entitled to relief." Id. (internal quotation
 11 marks omitted). When the claims in a complaint have not crossed the line from conceivable to
 12 plausible, plaintiff's complaint must be dismissed. Twombly, 550 U.S. at 570.

13 A jurisdictional attack pursuant to Fed. R. Civ. P. 12(b)(1) can be made in one of two ways.
 14 The motion can make a facial challenge, which asserts that the allegations contained in a complaint
 15 are insufficient on their face to invoke federal jurisdiction, or it can make a factual attack, which
 16 disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.
 17 Safe Air for Everyone v. Meyer, 373 F.3d 1035 (9th Cir. 2004). In the latter case, the judge may
 18 consider outside evidence and resolve factual disputes. Berardinelli v. Castle & Cooke, Inc., 587
 19 F.2d 37, 39 (9th Cir.1978); See also, Augustine v. United States, 704 F.2d 1074, 1077 (9th
 20 Cir.1983) (holding that unlike a motion to dismiss for failure to state a claim, under Fed. R. Civ. P.
 21 12(b)(6), a court can hear outside evidence regarding a motion to dismiss for lack of subject matter
 22 jurisdiction). Although the defendant is the moving party on a motion to dismiss, plaintiff bears the
 23 burden of establishing subject matter jurisdiction. Hexom v. Oregon Dept. of Transp., 117 F.3d
 24 1134, 1135 (9th Cir. 1999).

25 Here, Plaintiffs have averred the existence of federal jurisdiction pursuant to 43 U.S.C. §§
 26 1331 and 1343, since they bring their claims under 28 U.S.C. § 1983.

1 **III. Analysis**

2 **A. Due Process**

3 Plaintiffs' First Cause of Action is for alleged violations of due process. The Fourteenth
 4 Amendment to the Constitution prohibits a state from depriving "any person of life, liberty, or
 5 property without due process of law." U.S. Const., Amend. XIV.

6 **1. Liberty Interest**

7 The Supreme Court has long held that sexual activity inside businesses which are open to the
 8 public is not protected by the right to privacy. See Paris Adult Theater I v. Slaton, 413 U.S. 46, 65-
 9 66 (1973). The Supreme Court has "declined to equate the privacy of the home . . . with a 'zone' of
 10 'privacy'" that follows a person "wherever he goes." Id. at 66. The Ninth Circuit has "decline[d] to
 11 hold [that] the 'right' to unobserved masturbation in a public theater is 'fundamental' or 'implicit in
 12 the concept of ordered liberty.'" Ellwest Stereo Theaters, Inc. v. Wenner, 681 F.2d 1243, 1248 (9th
 13 Cir. 1982).

14 Here, Plaintiffs First Amended Complaint is devoid of any claim that Sextacy is or was
 15 intended to be a private organization and the Court will not supply this assertion for them. See
 16 Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459
 17 U.S. 519, 526 (1983)(district court need not assume that plaintiff can prove facts different from those
 18 alleged in the complaint). Nothing in Plaintiffs' complaint remotely suggests that Sextacy would
 19 have operated as a private club or that Sextacy was an extension of the home. To the contrary, the
 20 restaurant license for which Plaintiffs applied requires that Plaintiffs' business be public. In pertinent
 21 part, the Restaurant, Category 2 License for which Plaintiffs applied is defined in the Clark County
 22 Business License Code as "any space in a suitable building kept, used, maintained, advertised or held
 23 out to be a public place where hot, complete meals are prepared and cooked on the premises . . ." Clark
 24 County Code § 6.12.874 (emphasis added). Plaintiffs also claim that the "Fantasy Social Club
 25 and the Hushh Club . . . are also the same type of businesses as Sextacy" (Pls.' Compl. ¶ 34.).

1 Inherent in that argument is the admission that Plaintiffs' application for the other licenses is a
 2 subterfuge or facade for a sexually oriented business.

3 Furthermore, any claim alleging that Defendants' denial of business license applications
 4 infringes on a First Amendment protected expression is inapplicable here. The Supreme Court held
 5 that instances of sexual acts in a public store "[manifest] absolutely no element of protected
 6 expression." Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986). Since Plaintiffs have failed to
 7 plead that Sextacy was intended to be a private organization or claim a violation of protected
 8 expression, and because all claims and evidence provided by Plaintiffs show that it was intended to
 9 be open to the general public, Plaintiffs' liberty interest claim is not facially plausible.

10 **2. Property Interest**

11 The Supreme Court has held that "to have a property interest in a benefit, a person must
 12 clearly have more than an abstract need or desire [and] more than a unilateral expectation to it. He
 13 must, instead, have a legitimate claim of entitlement to it." Town of Castle Rock, Colorado v.
 14 Gonzales, 545 U.S. 748, 756 (2005). "A benefit is not a protected entitlement if government
 15 officials may grant or deny it in their discretion." Id. The Ninth Circuit held that a constitutionally
 16 protected property interest is created only if "the governing statute compels a result 'upon
 17 compliance with certain criteria, none of which involve the exercise of discretion by the reviewing
 18 body. . . .'" Shanks v. Dressel, 540 F.3d 1082, 1091 (9th Cir. 2008). "Whether an expectation of
 19 entitlement is sufficient to create a property interest will depend largely upon the extent to which the
 20 statute contains mandatory language that restricts the discretion of the decisionmaker." Doyle v. City
 21 of Medford, 606 F.3d 667, 672-673 (9th Cir. 2010).

22 Plaintiffs' property interest claim fails because the applicable code provisions do not contain
 23 mandatory language that significantly constrains Clark County's discretion. To the contrary, the
 24 plain language of the Clark County Code suggests that Clark County does have discretion to approve
 25 or deny licenses. In pertinent part, the Code states that the Board of County Commissioners may
 26 deny a business license "due to the applicant's failure to comply with any of the provisions of the

1 code.” Clark County Code § 6.04.090(a)(emphasis added). The section of the Code that was used to
 2 deny Plaintiffs’ licenses states that the Board may deny a business license if the applicant has made
 3 “false, misleading or fraudulent statements with respect to any material fact contained in the business
 4 license application and/or supporting documentation.” § 6.04.090(g)(emphasis added). Consistent
 5 with this analysis, the Nevada Supreme Court has invariably held that the granting, withholding, or
 6 revoking of similar licenses is discretionary on the Board’s part. See Cohen v. State of Nevada, 930
 7 P.2d 125, 127 (1997)(stating that generally the granting of a gaming license is a discretionary act);
 8 Esmeralda County v. Grogan, 94 Nev. 723, 725 (1978)(stating that the Court has consistently held
 9 that the granting, withholding, or revoking of a liquor license is a discretionary act). As the Board’s
 10 discretion is permitted and there exists no mandatory language that restricts the Board’s discretion,
 11 Plaintiffs failed to state a property interest claim. The Court finds that Plaintiffs’ First Cause of
 12 Action is not facially plausible, and is therefore dismissed.

13 **B. Equal Protection Claim**

14 In their Second Cause of Action, Plaintiffs allege violations of equal protection based on
 15 Defendants’ denial of Plaintiffs’ business license application for Sextacy. The Fourteenth
 16 Amendment’s Equal Protection Clause stipulates that no state shall “deny to any person within its
 17 jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV, § 1. The Equal Protection
 18 Clause requires that “all persons similarly situated should be treated alike.” City of Cleburne v.
 19 Cleburne Living Center, 473 U.S. 432, 439 (1985). In order to state an equal protection claim based
 20 on selective enforcement of law, a plaintiff must “show that the law is applied in a discriminatory
 21 manner or imposes different burdens on different classes of people.” Freeman v. City of Santa Ana,
 22 68 F.3d 1180, 1187 (9th Cir. 1995). To meet this burden, plaintiff “must identify a ‘similarly
 23 situated’ class against which plaintiff’s class can be compared.” Id. Then, if the selective
 24 enforcement “does not implicate a fundamental right or a suspect classification, the plaintiff can
 25 establish a ‘class of one’ equal protection claim by demonstrating that [he] ‘has been intentionally
 26 treated differently from others similarly situated and that there is no rational basis for the difference

1 in treatment””. Squaw Valley Dev. Co. V. Goldberg, 375 F.3d 936, 944 (9th Cir. 2004)(quoting
2 Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)(overruled on other grounds)). The
3 Plaintiff bears the burden of presenting evidence to establish these elements as a “class of one”
4 claim. Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005).

5 **1. Similarly Situated**

6 Plaintiffs fail to plead that they have been treated differently from other similarly situated
7 businesses. Unlike Plaintiffs, the other swinger’s clubs to which Plaintiffs compare themselves did
8 not make false and misleading statements on their applications for business licenses. Plaintiffs
9 confuse business license application approval with subsequent enforcement action against existing
10 businesses. Plaintiffs claim that “the Defendants . . . have never taken any action to revoke or
11 rescind the licenses of any other swinger’s clubs in Clark County, despite being on notice of their
12 existence” and that “Defendants . . . have knowingly permitted other similarly situated businesses to
13 operate swinger’s clubs with the same licenses sought by Plaintiffs.” (Pls.’ First Amended Compl.
14 ¶¶ 55, 56.) Even if this is true, it does not show different treatment from others who are similarly
15 situated. “Knowingly permitting other clubs to operate” is not synonymous with knowingly granting
16 business licenses to applicants who provide false and misleading statements about their businesses.
17 Plaintiffs were denied their licenses for making false and misleading statements. Plaintiffs have
18 made no claim that the Board knew at the time of licensing that the other clubs had made false or
19 misleading statements or would violate their licenses and operate as swinger’s clubs. Plaintiffs
20 attempt to show differential treatment is unavailing.

21 **2. Rational Basis**

22 Here, a rational basis exists for Clark County’s denial of Plaintiffs’ business license
23 applications. The Clark County Code provides that “all business license applications . . . may be
24 denied by the director or the board, as applicable, if the applicant has made false, misleading or
25 fraudulent statements with respect to any material fact contained in the business license application
26 and/or supporting documentation.” § 6.04.090(g). Plaintiffs’ applications were denied because they

1 intended to operate a business that is patently different than the types of businesses for which they
2 applied. The letter from the business license director, referenced in Plaintiffs' First Amended
3 Complaint (#8) and attached as Exhibit 1 in Plaintiffs' original Complaint (#1), furnishes two
4 reasons for the denial: First, for making false and misleading statements with respect to material facts
5 contained in the business license application and second, for failure to comply with required criteria
6 for restaurants. In their complaint, Plaintiffs' continually state that they sought to open a swinger's
7 club and never allege any intent to open a restaurant or gift/novelty shop. (Pls.' First Amended
8 Coml. ¶ 25.); (Pls.'s Opp. at 1.) Plaintiffs do not compare themselves to other restaurants or
9 gift/novelty shops but rather to other obviously sex-related swinger's clubs. (Pls.' First Amended
10 Compl. ¶ 34); (Pls.' Req. for Jud. Notice Exh. 5.) Plaintiffs' complaint shows an intent to operate a
11 business manifestly different from the businesses for which they applied. Therefore, the Court finds
12 that a rational basis clearly existed for Clark County's denial of Plaintiffs' business licenses.

13 Since the Court finds that a rational basis for Defendants' denial exists and that Plaintiffs
14 failed to factually plead that other alleged swinger's club businesses are similarly situated to
15 Plaintiffs', Plaintiffs' Second Cause of Action is not facially plausible and is therefore dismissed.

16 **C. Overbreadth Claim**

17 In their Fifth Cause of Action, Plaintiffs allege that the definition of "specified sexual
18 activities" in Section 30.08.030 of the Clark County Code is unconstitutionally broad. "(U)nder the
19 Supreme Court's 'overbreadth' doctrine, a plaintiff may challenge an overly broad statute or
20 regulation by showing that it may inhibit the First Amendment rights of individuals who are not
21 before the court." 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108, 1112 (9th Cir. 1999).
22 "The overbreadth doctrine is based on the observation that 'the very existence of some broadly
23 written laws has the potential to chill the expressive activity of others not before the court.'" Id. In
24 order for a plaintiff to have overbreadth standing, "an individual must present more than
25 '(a)llegations of a subjective 'chill'. 'There must be a 'claim of specific present objective harm or a
26 threat of specific future harm.'" Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975).

1 Here, Plaintiffs fail to plead adequate facts under the Iqbal standard to establish a claim using
2 the overbreadth doctrine. See Iqbal, 129 S. Ct. 1949 (holding that Rule 8 demands more than “labels
3 and conclusions” or a “formulaic recitation of the elements of a cause of action”). Plaintiffs’ Fifth
4 Cause of Action is devoid of sufficient factual matter to state a claim for relief and is merely
5 composed of conclusory statements. Plaintiffs’ only reference to the overbreadth claim states that
6 “the definition of a specified sexual activity as defined in CCC 30.08.030 is unconstitutionally
7 broad.” (Pls.’ Compl. ¶ 78.) Plaintiffs fail to provide the Court with any factual allegations
8 concerning the overbreadth of the specified sexual activity definition and how it relates to Plaintiffs.
9 More importantly, Plaintiffs fail to even plead that the overbreadth “inhibits the [constitutional]
10 rights of individuals who are not before the court.” See Convoy, 183 F.3d at 1112. Merely stating in
11 conclusory fashion that the section of the code is unconstitutionally broad does not satisfy the
12 heightened pleading standard of Iqbal, and therefore Plaintiffs fail to state a claim under the
13 overbreadth doctrine.

14 Even if Plaintiffs had properly stated a claim, damages are not an appropriate remedy when
15 brought under 28 U.S.C. § 1983. The Ninth Circuit has explained that an overbreadth claim “is
16 essentially a claim that a statute may be constitutional as applied to the plaintiff, but sweeps so broad
17 as to unconstitutionally suppress speech of others not before this court This theory presupposes
18 that the ordinance is constitutional as applied to the plaintiff.” Outdoor Media Group, Inc. v. City of
19 Beaumont, 506 F.3d 895, 907 (9th Cir. 2007). Because § 1983 damages are available only for
20 violations of a party’s own constitutional rights, the Ninth Circuit held that a plaintiff could not state
21 a claim for damages under § 1983 when making a challenge to a statute on the basis of a third-party
22 standing exception provided by the overbreadth doctrine. Id. Accordingly, the Ninth Circuit held
23 that § 1983 damages “are unavailable on an overbreadth challenge.” Id. Therefore, even if Plaintiffs
24 had properly pled, their request for damages would be inapplicable here.

25

26

1 **D. Vague**

2 In their Fifth Cause of Action, Plaintiffs also challenge the definition of specified sexual
 3 activities as defined in Section 30.08.030 of the Clark County Code on vagueness grounds. When
 4 analyzing a statute for vagueness, the court must “indulge a presumption of constitutionality.”
 5 Baggett v. Bullitt, 377 U.S. 360, 372 (1964). In a civil action, the “party challenging the facial
 6 validity of [a statute] on vagueness grounds outside the domain of the First Amendment must
 7 demonstrate that the enactment is impermissibly vague in all of its applications.” Hotel & Motel
 8 Ass’n of Oakland v. City of Oakland, 344 F.3d 959, 972 (9th Cir. 2003). “The challenger must
 9 establish that no set of circumstances exist under which the [statute] would be valid.” United States
 10 v. Salerno, 481 U.S. 739, 745 (1987). “A statute is void for vagueness when it fails to give adequate
 11 notice to people of ordinary intelligence of what conduct is prohibited, or if invites arbitrary and
 12 discriminatory enforcement.” United States v. Hungerford, 465 F.3d 1113, 1117 (9th Cir. 2006).

13 Here, Plaintiffs fail to plead adequate facts to establish either a facial challenge or an as-
 14 applied challenge under the Iqbal standard. Iqbal, 129 S. Ct. 1949. Plaintiffs’ Fifth Cause of Action
 15 is devoid of sufficient factual matter to state a claim for relief and is merely composed of “formulaic
 16 recitations” of the elements of a cause of action and conclusory statements regarding those elements.
 17 See Id. Continually pleading that “the definition of a specified sexual activities as defined in the
 18 Clark County Code, Section 30.08.030 is unconstitutionally vague on its face and as applied to
 19 Plaintiffs” is a mere conclusory statement that does not meet the heightened pleading standard
 20 of Iqbal. (Pls.’ Compl. ¶ 77.)

21 Even if properly pled, the statute on its face is not vague. “Whether a [statute] is
 22 unconstitutionally vague is a question of law.” United States v. Erickson, 75 F.3d 470, 475 (9th Cir.
 23 1996). Questions of law may be resolved on a motion to dismiss. See Knieval v. ESPN, 393 F.3d
 24 1068, 1073-74 (9th Cir. 2005). “The notice test of vagueness looks at the ‘very words’ of the statute
 25 in question to determine whether the statutory language is sufficiently precise to provide
 26 comprehensible notice of the prohibited conduct.” Anderson v. Morrow, 371 F.3d 1027, 1031-32

1 (9th Cir. 2004). “A statute is void for vagueness when it fails to give adequate notice to people of
2 ordinary intelligence of what conduct is prohibited” United States v. Hungerford, 465 F.3d
3 1113, 1117 (9th Cir. 2006).

4 Specified sexual activities under the Clark County Code is defined as:

5 (A) Human genitals in a state of sexual simulation of arousal, (B) acts of human
6 masturbation, sexual intercourse or activity or sodomy, [and] (C) fondling or other erotic
touching of human genitals, pubic region, buttock or female breast.

7 Clark County Code § 30.08.030. Based on the plain language of the statute, the Court finds that the
8 definition is clearly delineated and that people of ordinary intelligence are given more than adequate
9 notice as to what “specified sexual activity” means under Clark County Code § 30.08.030. The
10 statute is not unconstitutionally vague. Plaintiffs’ Fifth Cause of Action is dismissed.

11 **IV. Conclusion**

12 The Court finds that Plaintiffs’ First, Second, and Fifth Causes of Action are not facially
13 plausible and are therefore dismissed for failure to state a claim. As Plaintiffs’ remaining claims are
14 state claims, the Court dismisses Plaintiffs’ First Amended Complaint in its entirety for lack of
15 subject matter jurisdiction, pursuant to Fed. R. Civ. Pro 12(b)(1).

16 Accordingly, **IT IS HEREBY ORDERED** that Defendants’ Motion to Dismiss (#22) is
17 **GRANTED**.

18 Dated this 30th day of June, 2011.

20
21 
22

Kent J. Dawson
United States District Court
23
24
25
26